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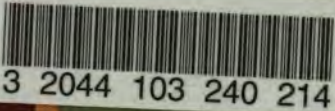
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**T**HE CONCEPTION  
AND REALIZATION  
OF NEUTRALITY. *By*  
DAVID JAYNE HILL, LL.D.

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# THE CONCEPTION AND REALI- ZATION OF NEUTRALITY

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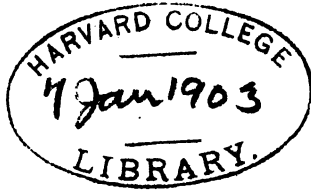
BY  
DAVID JAYNE HILL, LL.D.  
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## THE CONCEPTION AND REALIZATION OF NEUTRALITY.

Among the causes which have aided in the pacification of the world none has been more potent than the practice of neutrality by sovereign nations. It is the purpose of this paper to trace the origin of this practice, to show the causes of its progress, and to measure its importance to the welfare of mankind.

So long as the Roman Empire continued to regulate the affairs of Europe, the idea of indifference to the conflicts in which it was engaged was impossible; for imperial unity involved all parts of the empire in active support of the wars by which Roman dominion was maintained and extended. When, in the fourth and fifth centuries of our era, the imperial system began to go to pieces and the barbaric kingdoms were formed upon its ruins, no international system developed before the Frankish kingdom, extending its conquests in every direction and uniting its interests with those of papal Rome by the coronation of Charles the Great as Emperor of the West, had reconstituted the imperial power in Western Europe. The weakness and subdivision of that empire after the death of Charles the Great left the local barons to the chances of a general struggle for supremacy during the long period in which the process of feudalization was creating the beginnings of local territorial authority, destined at last to develop, in the heat of a bitter and protracted conflict, into the modern state system, in which the rights of local sovereignty were affirmed and the great nationalities became consolidated in the form of independent monarchies. Then followed the struggle for a system of equilibrium by which the newly formed nations could maintain their independence, and prevent the revival of that imperial supremacy from which they had all escaped,—a struggle in which all were compelled to participate as a means of preserving their existence.

There was, therefore, no period of time in the history of Europe, from the rise of the Roman Empire to the beginning of the seventeenth century, when either the right or the duty of national neutrality could find a place in the thoughts of jurists or statesmen. A careful review of the history of jurisprudence during these centuries shows that no such idea was ever seriously entertained. Throughout the whole period of Roman domination we detect hardly a faint glimmering of the conception of neutrality. In mediæval times the total absence of the idea is notable. Within the empire no one of its constituent parts could be inactive in the struggles in which it was engaged, and outside of the empire existed only the infidel, with whom there could be no peace. Machiavelli well expressed the view of his generation when he condemned neutrality on the ground that it was always more profitable to side with one or the other of the belligerents. The Borgias considered that they were sufficiently neutral in permitting both sides to enlist troops in Rome, for the hire of soldiers to warring nations was esteemed by them a legitimate industry. Nor was the policy of the Borgias exceptional. "Foreign assistance was always freely forthcoming for the belligerents of the Middle Ages. Not merely were private adventurers ever ready for foreign warfare; not merely did penniless knights-errant and needy squires, in time of domestic peace, wander abroad, like the ancient Vikings, in search of honor and profit: Brabançons and Genoese cross-bowmen took service in troops with the monarchs of England and France; skilled commanders, like Hawkwood and Bertrand du Guesclin, led well trained and organized armies, under the name of Free Companies, to the banners of prince after prince; and princes and kings themselves not only permitted recruiting within their borders for foreign warfare, but despatched, and even in person led, auxiliary regiments to the assistance of one or the other belligerent, while claiming to be on terms of undiminished general friendship with the assailed opponent."\*

If the time was oblivious of the duty of neutrals, it was not less regardless of neutral rights. Military assistance and trade with an enemy were punished, when possible, with equal severity; and all commerce was practically regarded as contraband. Edward I. endeavored to annihilate the trade of the Flemings with Scotland, and in 1295 required masters of neutral vessels lying in English

\* Walker, *History of the Law of Nations*, i. pp. 135, 136.

ports to give security not to trade with France. The sanctity of neutral territory was habitually disregarded. On the sea the "Consolato del Mare," following the treaties of the thirteenth and fourteenth centuries, laid down the simple rule, "Confiscate the goods of your enemy: respect the property of your friend," regardless of the neutral flag. By a rule of the same maritime code a neutral vessel, whose master refused to carry belligerent goods at the command of his captor, might be sent to the bottom of the sea without any compensation to its owner.

Even during the greater part of the sixteenth century the idea of neutrality had made so little progress that the subjects of states not directly engaged in war were regarded merely as *non-hostes*, or *medii in bello*, without other rights or duties than those of mere non-combatants. How far removed from incorporation in accepted public law the idea of neutrality was in the beginning of the sixteenth century, is evident from the fact that it then first began to be specifically embodied in treaties; as, for example, in those between Henry VII. and Maximilian, King of the Romans, in 1502, and between Henry VII. and the Elector of Saxony in 1505, who bind themselves expressly to neutral conduct, thereby showing the recognized absence of the idea from the accepted law of nations.

Not until the wars of religion had lapsed into wholly political conflicts could the conception of neutrality obtain acceptance; for Christendom could not recognize the right of any prince to be neutral in the heated struggle for principles which, like those of religion, were believed to be of universal interest and significance. Religious partisanship continued to be regarded as a justification for armed intervention even in the seventeenth century, James I., of England, giving permission to the Dutch in 1603 to enlist troops in Scotland; and as late as 1620 London was placarded with royal proclamations authorizing the enlistment of soldiers by Gustavus Adolphus in his campaign of the Thirty Years' War. But the same Englishmen who had applauded the enlistment of their countrymen by the royal authority to serve the German Protestants against the Catholic emperor and the Dutch against the Spaniards felt it a shame when Charles I. sent his troops to the King of France for the subjugation of the Huguenots.

When, in 1625, Grotius published his great work, he founded his system of public law upon the idea of territorial sovereignty,—

the great principle which now underlies the whole political structure of contemporary Europe. All the accepted rights and duties of neutral powers were, no doubt, logically involved in that fundamental principle; but the great jurist entertained but a dim perception of the implications which now seem to flow by necessity from his central doctrine. "It is the duty of those who profess neutrality in war," he says, "to do nothing toward increasing the strength of a party maintaining an *unjust cause*, nor to impede the measures of a power engaged in a *just and righteous cause*,"—which is simply an elaborate way of saying, *Do not help the wrong side*. It is a sufficient commentary upon juristic ideas at the beginning of the seventeenth century to say that the greatest jurist of that age had formed no conception of neutrality as a right or a duty of sovereign nations.

## II.

(It is events, rather than the utterances of publicists, which have established the laws of nations. The modern conception of neutrality had its birth in conflicts upon the sea, the common heritage of all nations and the exclusive possession of none. But long after the general suppression of piracy the rights of neutral commerce were still in abeyance. Some of the old maritime codes respected neutral property, even on a belligerent vessel; but even in the seventeenth century examples were not unusual of the confiscation of a friendly ship because laden with an enemy's goods. Nations supported or opposed the claims of the neutral trader, according to their temporary interests; and as late as 1617 the Venetians compelled English merchant vessels to unload their cargoes and serve in war against the enemies of Venice.

The first important step toward the definition of neutral rights was the delimitation of neutral waters. The earliest public proclamation of neutrality preserved to us was that of James I., of England, in which in 1604, during the contest of Spain and the United Provinces, he forbade the exercise of any act of belligerency within prescribed limits, and extended his protection to all merchant vessels within "the King's Chambers," as he called the waters enclosed by "a straight line drawn from one point to another about the realm of England."

This manifesto did not prevent the Dutch and Spanish fleets from engaging in a furious battle, in the following year, in the very

harbor of Dover ; and it was only after the victory had been won by the Dutch, and the captives, tied two and two, were thrown into the sea, that the castle battery opened fire in indignant execution of the king's decree. In 1624, a French vessel being attacked by a Dutch ship as she was leaving an English port, in the words of the chronicler, " a king's ship came in to part them, and letting fly equally at them both, with blows of cannon equally distributed, persuaded them to peace."

Thus was inaugurated the principle of territorial waters, now by general consent, with few exceptions, confined to the three-mile limit, but finally brought to general recognition only after a long period of struggle and compromise. (The exaggerated pretensions of Spain and Portugal to the sovereignty of the seas of the New World, by virtue of the famous decree of Pope Alexander VI., had to be bitterly contested by Holland, whose great publicist, Grotius, in his "*Mare Liberum*," contended for the common right of all nations to enjoy free navigation. The equally groundless claims of England, put forth by Gentilis in 1613 and by Selden in his "*Mare Clausum*" in 1633, assuming territorial jurisdiction over the "Narrow Seas," or waters between Great Britain and the mainland, had to be stoutly resisted by France and other maritime powers as an encroachment on their rights, eliciting for a time the curious phase of opinion, represented by Puffendorf in 1672, that narrow seas naturally belong equally to the sovereigns of the lands laved by their waters.

Finally, as the result of armed contentions prosecuted through years of struggle, emerged the two great principles of the freedom of the open sea and the inviolability of territorial waters,—principles which lie at the basis of the modern conception of neutrality; on the one hand, regarding the great deep as the common possession of mankind, and, on the other, prohibiting conflict within the limits of recognized maritime jurisdiction. Strange as it may seem, the inviolability of neutral territory on land was not conceded as a sovereign right until territorial prerogatives had been first vindicated upon the sea. The insular isolation of England and her maritime strength rendered possible the assertion of a principle that has finally been universally recognized.

The whole modern development of neutrality is derived from the reconciliation of two opposing principles,—the right of a peaceful nation to carry on commercial intercourse with other

nations and the right of a belligerent power to protect itself from the injury that results from commerce with its enemy. Unrestricted, the right of commercial intercourse includes the prerogative of performing all those activities which pertain to the peaceful interchange of commodities between nations,—the manufacture, sale, and delivery of such objects as it is found profitable to produce and to export. But in times of war this right is of necessity restricted by the right of a belligerent nation to prevent such commerce with the enemy as specifically enables its antagonist to resist its military measures. The reconciliation of these two opposing rights has been a long historic process, not yet entirely complete.

Such writers as Bynkershoek and Vattel, even in the middle of the eighteenth century, maintained the right of neutral states to permit the enlistment of soldiers within their territories. The former says, "I think that the purchase of soldiers among a friendly people is as lawful as the purchase of the munitions of war."\* Vattel remarks, "The Switzers grant levies of troops to whom they please, and no power has hitherto thought fit to quarrel with them on that account";† but he thinks complaint might arise if the privilege were accorded to one belligerent and denied to another. Progress in the apprehension of neutral duty gradually modified this view; but it was not until after the middle of the nineteenth century that the Swiss Confederation passed a law abolishing the system, and making it a penal offence for foreigners to enlist Swiss soldiers for service in a foreign state.

Grotius correctly describes the practice of the seventeenth century in stating that the right of passage through neutral territory could, if denied, be taken by force.‡ Vattel, however, notes an advance of thought in stating that it is a violation of sovereignty to enter territory without the consent of its sovereign, except in case of extreme necessity, when, he thinks, an army, to avoid destruction, may force its way, "sword in hand," through neutral territory.§ As late as 1815 the allies compelled the Federal Council of Switzerland to grant permission for the passage of invading troops; but practice and opinion have since respected the inviolability of neutral soil, even to the extent of denying the right of a neutral to permit the passage of troops.

\* Bynkershoek, *Quest. Jur. Pub.*, i., c. xxii.

† Vattel, *Droit des Gens*, iii., § 10.

‡ Grotius, *De Jure Belli ac Pacis*, B. I., c. ii., sec. x.

§ Vattel, *Droit des Gens*, iii., § 122.

Numerous acts, denied to neutral states as such, are, nevertheless, still allowed to their individual citizens willing to take the risks of performing them, such as loaning money to belligerent governments, supplying arms and munitions of war, and enlisting in alien territory to serve in foreign armies. Individual publicists, as Bluntschli, Phillimore, Halleck, and Calvo have indeed declared some of these individual rights to be violative of neutrality; but practice has sustained these privileges, and other publicists have as strongly defended them. In our Civil War the bonds of the Confederate States were publicly taken in England, Germany, France, and Holland without interference or reprisal; and in 1872 ordnance stores were sold, even by the government of the United States, with a knowledge that they were purchased by agents of the French government for use in the Franco-German War, and this act was defended by a committee of Congress on the ground that it was a public sale authorized before the war broke out, and without the purpose of influencing the strife.

The principal modern controversies regarding the prerogatives of neutrals have been connected with the definition of contraband of war. From one point of view, everything is contraband which aids a belligerent in attacking or resisting his enemy. For reasons growing out of her position as a maritime power, England has always endeavored to widen the idea of contraband, and to interdict all commerce with her enemies; and her superior naval armament has enabled her to enforce her doctrine with a merciless execution. It was in resistance to the arrogant pretensions of England on the sea that the armed neutrality of 1780 was conceived by the great minister of Louis XVI., Vergennes, organized by Catherine II., of Russia, and sustained by an almost united Europe,—a league for the defence of neutral commerce which greatly facilitated the independence of the American colonies. The doctrines sustained by the League of the Armed Neutrality were: (1) the right of neutral ships to sail from port to port, even on the coast of belligerent nations; (2) the idea that free ships make free goods, except contraband of war; (3) the determination of the nature of contraband by the Russo-British treaty of commerce of June 20, 1766; (4) the proposition that no blockade is to be considered actual unless it is effective; and (5) the demand that these principles prevail in judging the legality of prizes.

It would be tedious to recount the vicissitudes of these reason-

able doctrines, triumphant for a time through the united efforts of Europe, dishonored and discarded by their most zealous advocates in the tumult of the French Revolution, reinstated by the second armed neutrality in 1800, again abandoned in the Titanic maritime struggle provoked by Napoleon's Continental System, and finally accepted as a permanent part of the law of nations by the adherents to the Declaration of Paris of 1856, which abolished privateering, established the rule that the neutral flag protects the goods of an enemy and the freedom of neutral merchandise on an enemy's ship, except contraband of war, and limited the right of blockade by its actual effectiveness.

### III.

The part played by the United States in realizing the great conception of neutrality forms one of the most honorable chapters in our national history. Earnestly desiring peace and amity as the essential conditions of civil development, our government hastened from the first to incorporate in its earliest treaties standards of neutral right and duty hitherto unheard of in the history of the world. In the treaty of 1778 with France, contraband was greatly restricted by definition; and in the treaty of 1785 with Prussia it was stipulated that even arms and munitions of war, if captured, were to be paid for at their full valuation, thus exempting all private property at sea from confiscation. "The policy of the United States in 1793," says a great English writer, "constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has, up to the present day, advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations."

Basing its recognition of other governments upon the new principle, that the will of a nation, in choosing its government, is the only important matter to be regarded, and rejecting the old doctrine of dynastic legitimacy, the United States thereby made an important contribution to the law of nations, and by its neutrality act formed the first systematic plan that had ever been framed

\* Hall, *A Treatise on International Law*, p. 594.

for the enforcement of neutral duties. The acts of 1794 and 1817, culminating in the comprehensive statute of 1818, whose provisions are now embodied in the Revised Statutes, opened a new era in the realization of neutrality. A similar act, though less effective in form, was passed the following year by the British Parliament; and analogous laws, or regulations, were from time to time made by other governments. Thus, following the example of the United States, all civilized countries have at last come to recognize the duties of neutral countries as a part of the public law of nations.

The course of the United States in vindicating neutral rights has not been less conspicuous than its initiative in prescribing neutral duties. The decrees of the National Convention of France, and, later, those of Napoleon, on the one hand, and the orders in council of Great Britain, on the other, threatened to sweep American commerce from the ocean; but a stout resistance finally prevailed, and pecuniary indemnities for a part of the losses sustained by American traders were subsequently obtained from both countries. The pretensions then put forth by European powers would now be regarded as insufferable impertinences and open violations of the established system. Their fate has been shared by the preposterous claims respecting visitation and search in time of peace and the barbarities of impressment, so long endured by this country.

But the great hour of triumph for the enforcement of neutrality came at the close of our Civil War, when Great Britain was called upon to answer to our "Alabama" claims. The Treaty of Washington, concluded on May 8, 1871, for the settlement of those claims, laid down rules for the guidance of the arbitrators which required "due diligence" to be exercised by a neutral government to prevent violations of the principles of neutrality; and the decision of the tribunal was that "due diligence" ought to be exercised by neutral governments *in exact proportion to the risks to which either of the belligerents may be exposed* from a failure to fulfil the obligations of neutrality on their part. So rigorous a standard of neutral responsibility, and the award of an indemnity of \$15,500,000 in gold, to be paid by Great Britain to the United States, on account of the negligence of the former government, brought the world to a recognition of the fact that neutral governments are charged with immense responsibilities. But the chief

effect of the Geneva decision was to call attention to the fact that the complication of international relationships has reached a stage of development where the conception of neutrality becomes almost incapable of realization; for who will attempt to measure the "exact proportion of the risks to which either of the belligerents may be exposed"? It is evident that it is usually unequal, which seems to require a different course of action toward belligerents in different wars, and even toward different belligerents in the same war, so that the conception of neutrality, in the old sense, disappears altogether.

A wholly inland belligerent, for example, possessing no means for procuring supplies or of arresting contraband by sea, would be exposed to enormous risks of injury by war with a maritime power able to keep up its own supplies and cut off communication with its enemy. Does neutral duty require that the enormity of this risk be measured by other nations and their trade with a nation with which they are at peace be suppressed, in order to diminish the disadvantages of an unfortunate belligerent?

The rules of Washington and the interpretation put upon them have not found general acceptance, even among American jurists. As one of the most noted has well said:—

"It will be at once seen that these rules, though leading immediately to an award superficially favorable to the United States in the large damages it gave, placed limitations on the rights of neutrals greater even than those England had endeavored to impose during the Napoleonic wars, and far greater than those which the United States had ever previously been willing to concede. If such limitations are to be strictly applied, the position of a neutral, so it may be well argued, will be much more perilous and more onerous, in case of war between maritime powers, than that of a belligerent. Our government, to fulfil the obligations cast upon it by these rules, would be obliged not only to have a strong police at all its ports to prevent contraband articles from going out to a belligerent, but to have a powerful navy to scour the seas to intercept vessels which might elude the home authorities and creep out carrying such contraband aid. It must be recollected that not only our Atlantic and Pacific coasts, but our boundary to the north and to the south, contains innumerable points at which belligerents can replenish their contraband stores, and that nothing but a standing army or navy greater than those of any European power could prevent such operations. Nor would this be the only difficulty. No foreign war could exist without imposing upon the governments of neutral states functions in the

repression of sympathy with either belligerent which no free government can exercise without straining its prerogatives to the utmost." \*

No nation, except the United States and Great Britain, has formally accepted the doctrine of the Geneva tribunal; but, if it ever should be generally accepted, justice would require that the duties to which that doctrine binds should be offset by an enlargement of neutral rights, for a foreign war would be a calamity so great that unusual measures on the part of the nations would be justified to avert it. Such an offset could be found only in an extension of the right of intervention for the sake of peace. In truth, our own government has recently exercised this right in its interference to terminate the unhappy war that was so long waged in Cuba. Our government and our people were worn out with observing the obligations of non-intervention during that protracted and pathetic contest, and at last determined to suppress it. The United States, in that crisis, assumed the part of a great pacificator, and, when its patience became exhausted with the strain of prolonged endurance, bade its great guns thunder, "Let us have peace."

And this is the consequence which must result universally from the over-tension of neutral duty. So long as the course of events tended toward the extension of neutral rights, neutrality seemed a blessing to great portions of mankind, who were thereby absolved from participation in the conflicts of others; but now that the tendency is to obstruct the freedom of industry and commerce, for which the great battle of neutrality was fought, and to impose new burdens and restrictions upon neutral nations, it becomes evident that this phase of progress in the course of social development is, in reality, but negative and transitory, and that no nation can be indifferent to the quarrels of others. The conception of neutrality has been a great contribution to human progress, but it is not a final term. It has produced the condition of regional responsibility,—the ethical correlative of territorial sovereignty. It has said to the world, Let those who are disposed prove that peace is better than war, and has thereby limited the area of belligerency. But it is now seen that, although the independence of peoples is a great and noble idea, the interdependence of mankind is a more deeply rooted and essential truth. The international ownership of

\* Wharton's Digest, vol. iii. p. 650.

the great lines of oceanic transportation is only an outward sign of a far more significant fact,—the community of interests between the nations. The burden of neutral obligations between great powers in time of war renders the possibility of such a calamity dreadful to contemplate and almost paramount to war itself. Henceforth men will hear of wars and rumors of wars with saddened hearts and apprehensive minds; and as once, to vindicate the rights of peaceful commerce, great armed neutralities were formed, so in the future great armed pacifications may become the means of a higher social evolution. The “sovereignty of nations” is a formidable term, and most jealously guarded by those who represent its interests; but the sovereignty of humanity is a deeper reality, and marks a higher stage of political development. Given as many centuries as the realization of the conception of neutrality has required, the rights of peace may also be established among men. The days of complete disarmament may never dawn; but there is comfort in the thought that the greatest war-lord of Europe, commanding the most disciplined armies, has during his entire reign been willing and able to keep the peace. A generation has grown from infancy to manhood without witnessing a European war. A generation of Americans has reached middle life without participating in any war but one with the noble purpose of commanding peace. Behind these conditions are mighty social forces which are augmenting in power from day to day. They have claimed and won the right to pursue their path of progress without being drawn into conflicts which they believed did not affect them. They now perceive that every human interest is affected by every serious conflict, and they will strive to maintain the peace of the world as they have striven to secure the right of neutrality. The workers in the field of social science have no more vital problem to solve than that which engages the constant attention of all intelligent statesmen and diplomatists,—the problem of still further establishing the interests of peace by steadily diminishing the incentives that urge toward war.

A handwritten signature, possibly 'S. J. K.', is written over the date '4/14/16'.











